



## Defence Committee

### Oral evidence: [Armed Forces \(Service Complaints and Financial Assistance\) Bill](#), HC 508

Tuesday 15 July 2014

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Written evidence from witnesses:

- Anna Soubry MP, Minister for Defence Personnel, Welfare and Veterans
- Mr Gavin Barlow, Director, Service Personnel Policy, Ministry of Defence
- Brigadier John Donnelly CBE, Director, Personal Services (Army)
- Group Captain Mark Heffron, Deputy Assistant Chief of Staff (Air Personnel), HQ Air Command
- Commodore Andrei Spence, Head, Naval Legal Services
- [Dr Susan Atkins CB, Service Complaints Commissioner for the Armed Forces](#)

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Members present: Rory Stewart (Chair); Mr James Gray; Mr Dai Havard; Mrs Madeleine Moon; Sir Bob Russell; Derek Twigg; John Woodcock

Questions 67-255

Witnesses: **Mr Gavin Barlow**, Director, Service Personnel Policy, Ministry of Defence, **Brigadier John Donnelly CBE**, Director, Personal Services (Army), **Group Captain Mark Heffron**, Deputy Assistant Chief of Staff (Air Personnel), HQ Air Command, **Commodore Andrei Spence**, Head, Naval Legal Services, and **Anna Soubry MP**, Minister for Defence Personnel, Welfare and Veterans, gave evidence.

**Q67 Chair:** Welcome to the Defence Committee and the Armed Forces (Service Complaints and Financial Assistance) Bill inquiry. We are fortunate today to have as our witnesses Anna Soubry, who has been recently promoted within the Ministry of Defence, and the specialists Brigadier John Donnelly, Gavin Barlow, Commodore Andrei Spence and Group Captain Mark Heffron. Welcome and thank you all very much for coming.

Some of our witnesses—this is now the second formal session we have had in quick succession—have been concerned that the Service Complaints Ombudsman proposed in the

legislation is simply a compromise to accommodate the concerns of the service chiefs about preserving the chain of command. In other words, there is a conflict between the chain of command and genuinely independent ombudsmen, and witnesses are concerned that this is a compromise solution that gives too much deference to the chain of command and has not created a fully independent ombudsman, particularly when compared to European models. Would you like to address that big question first, please?

**Anna Soubry:** You may be surprised to know that I don't accept that, obviously. I think there is a very good reason why that is just not made out. I will put it in this way: you could argue that when those who want to maintain the chain of command in a particular way are concerned that this undermines the chain of command, and those that want an ombudsman of a certain description think it does not go far enough and actually you have met somewhere in the middle, there is a good argument that you have got it right. I believe we have got this right because we have struck the right balance between making sure that when somebody makes a complaint and feels that they have not had it properly considered, in the way that it should have been, and that there has been some failing on the administrative side—this maladministration, and we can go into detail as to what that encompasses—there is a need to have that rigour of a Service Complaints Ombudsman while at the same time absolutely maintaining the chain of command.

I think we have got the balance right because we still have the chain of command, but we also have, in our Service Complaints Ombudsman, somebody who has now got extra powers. Most significantly, if I may say, the fact that Dr Atkins has herself endorsed this Bill is very powerful. She has been recognised as being not only rigorous, but, perhaps critically, absolutely independent.

**Q68 Chair:** Minister, one of the experiences with other kinds of ombudsmen has been that they tend to begin looking just at maladministration and then over time the norm has become that they evolve to begin looking at the substance of complaints. At the moment, the ombudsman that you have proposed is an older model. It is quite limited and looks at the process rather than at the substance. Do you think that over time you are going to find yourself under very understandable pressures, which other ombudsmen have found in other Government Departments, to expand that role to look not just at the process, but at the substance of complaints? If so, would it not be worth anticipating that in the legislation now?

**Anna Soubry:** No, because I think that what we have achieved in the Bill is this right balance between the two. It was put to me very well yesterday by one of my officials when we met to discuss today's proceedings. They said that when we look at maladministration—I am going to sound a bit like a lawyer, but forgive me because I am an old lawyer—we make the mistake of thinking that you just look at whether or not you have done this within the right time frame, have you ticked the right box here, and it is not as simple as that. When you are looking under that umbrella of maladministration, one of the things is, for example, not whether or not you think that this evidence outweighs that evidence, which would effectively be a rerun and another appeal, but whether or not those people that have considered the evidence have given the right weight to it. I hope that makes sense because there is a big difference between the two concepts of looking at the evidence and making a decision as to the weight of it, and actually looking at the process—this is just an example—and saying, “Did they give sufficient weight to this part of the evidence over another part of the evidence?” It is almost like a judicial review, and I think that is good and it satisfies us.

**Q69 Chair:** Just before I hand over to Madeleine Moon, our sense is that you are right—that is the distinction that a lot of ombudsmen began with in the past—but experience has shown over time that that distinction is quite difficult to sustain, particularly if you feel you have been unjustly treated. The beginning of this is that there are people, from a lot of polling data, within the military who feel uncomfortable about being able to complain, they do not fully trust the chain of command and are looking for a straightforward way of making their complaints. What we have discovered with other ombudsmen outside the Ministry of Defence is that from the point of view of the individual complaining, who is obviously very important in this as they feel victimised or have been harassed in some fashion, that distinction begins to feel like a very narrow legal distinction. Many other ombudsmen have therefore decided to get rid of that distinction.

**Anna Soubry:** I don't doubt that that is right, but I feel that with this legislation, it is right for now and I anticipate that it has longevity. That is not to say that any Government wouldn't, in the future, return to see if things are working right, but I think the powers the ombudsman has are sufficient to satisfy all that is demanded of this position.

**Q70 Mr Havard:** Minister, as you probably know, I've got form on this question, for the simple reason that my name is on the duty of care report that we did in 2005, which originally stemmed from events in Deepcut and all the rest of it. We recommended processes at that time. One thing that was clear then and is clear now is to give confidence to the people that it is going to cover. As we have seen recently with the latest inquiry into abuse in children's homes and so on, the method of appointment of the person who does the job can be problematic or can be done in a way that doesn't cause problems. Please say why you have chosen the method you have. What other methods were thought about and why did you reject those in favour of the one you have chosen?

**Anna Soubry:** Perhaps others, Gavin in particular, can talk about other methods. This method of advertising this job—now a full-time job—with an expectation of it being a job for a number of years, with the description that it will have, I am confident will—

**Q71 Mr Havard:** But this is a recommendation by the Secretary of State to Her Majesty to appoint an individual, full stop?

**Anna Soubry:** It will go through a process—perhaps Gavin could explain exactly what that process is, to give you the nuts and bolts of the process—before the Secretary of State makes his or her recommendation.

**Q72 Mr Havard:** That would be helpful.

**Anna Soubry:** Of course.

**Mr Barlow:** The process for appointments follows the rules set by the Office for the Commissioner for Public Appointments. There is an open competition. We provide an advert that anyone can reply in response to. We have consulted with the current Commissioner over the terms of that advert and, indeed, we have allowed the Committee to have an opportunity to comment on the terms of reference and the person specification for the individual.

The process is chaired by an independent Public Appointments Assessor—not someone from the Ministry of Defence—who acts within the OCPA guidelines for the process and ensures that the Department follows them. The selection panel includes senior military personnel and senior officials. During the process, the Ministers are consulted again, under OCPA guidelines, about the way the sift is conducted and the approach that has been taken to identify a suitable person. At the end of the process, we hope to identify two candidates for Ministers, in the normal way, for them to make a decision on which candidate to recommend to Her Majesty.

**Anna Soubry:** So the ultimate decision is taken by the Secretary of State, but it is basically my position as well.

**Mr Barlow:** And of course, as part of the process—this is new as it wasn't part of the process that was in place at the time of the appointment of Dr Atkins—there is a pre-appointment hearing by this Committee, so you get a chance to see the pre-selected candidate before the final appointment is confirmed.

**Q73 Mr Havard:** Exactly. You will know, Minister, that sometimes we ask questions that we already partly know the answer to, but that is not for our benefit. It is important to put a lot of these things on the record so that the people who are going to be subject to the process understand the process and have confidence in it. Yes, we are going to be involved in the pre-appointment process. What other ways is Parliament going to be involved? For example, this person will relate to health, education and other people. Are there any thoughts about how else Parliament will be involved in discussing with the individual?

**Anna Soubry:** Forgive me, I don't know how they would relate to health and education.

**Q74 Mr Havard:** It may well be that the issues that come to them will force them into discussions about mental health and all sorts of different things.

**Anna Soubry:** Ah, yes. I can see—

**Mr Barlow:** It is hard to see how the ombudsman would have significant contact with Departments other than the Ministry of Defence and the Armed Forces when dealing with actual service complaints.

**Q75 Mr Havard:** Okay. The appointment is for five years, but five years is not in the Bill. Why is the period of appointment not in the Bill?

**Anna Soubry:** Because we don't think it needs to be set in legislation. It can be done by regulation or by the Secretary of the State.

**Q76 Mr Havard:** Will it be by regulation or by the Secretary of State?

**Anna Soubry:** It will be part of the terms and conditions laid down by—

**Mr Barlow:** For the first appointment, it will be set out in the job adverts, and it will be part of the contract with the individual when appointed. Lord Astor said in evidence to the Lords at Committee stage that we wouldn't envisage the appointment being renewable.

**Q77 Mr Havard:** You would not?

**Mr Barlow:** We would not, no.

**Q78 Mr Havard:** One of my questions was going to be about whether or not they could do more than one turn. So the answer is no—one turn?

**Mr Barlow:** Yes.

**Q79 Mr Havard:** Presumably, the Secretary of State can terminate the contract within five years?

**Mr Barlow:** I don't think there is provision for that in the terms and conditions.

**Anna Soubry:** I think it would be the Queen.

**Commodore Spence:** I think Her Majesty would act on a recommendation.

**Q80 Mr Havard:** A recommendation would be made by Her Majesty, and then she would—

**Commodore Spence:** And that would be for things such as malfeasance and the usual reasons you might expect in public office.

**Q81 Mr Havard:** Well, quite. I do not anticipate that you will need to use it immediately.

**Commodore Spence:** Indeed not.

**Q82 Mr Havard:** But if we are dealing with a legislative process, we need to have the process in place, don't we? It's as simple as that, really. It excludes current members of the armed forces and civil servants from being appointed. As with other appointments of that sort of nature—previous Ministers, and so on—will there be time limits so, for example, someone who has been a civil servant or has been in the military might, after a period of time, be considered, or is it a blanket restriction that will be in place no matter what?

**Mr Barlow:** We thought it best not to set an arbitrary limit. Clearly, when we are looking at individual candidates through the sift process, there will be judgments to be made. It depends, in part, on how closely associated individuals are with matters that might be raised within the complaints process.

**Q83 Mr Havard:** Obviously, by definition, if they don't get the job the first time, it is five years before they can apply for the second time anyway—I appreciate that. It is just interesting that, in terms of the legislation, there seems to be a complete debarment to them being able to apply at any time.

**Mr Barlow:** They certainly can't apply if they are standing members of the armed forces or civil servants. We wouldn't entertain those applications.

**Mr Havard:** Okay. Thank you.

**Q84 Mr Gray:** May I follow up on the appointments system? First, if the Secretary of State is the person who advises the Queen about how long the person is going to be appointed for, and if they lay down the terms and conditions and advise the Queen about removing this person, isn't there an argument to say that the Secretary of State will have an undue degree of influence over the ombudsman?

**Anna Soubry:** Well, you could argue that, but I think it would be the wrong argument to advance.

**Q85 Mr Gray:** Why?

**Anna Soubry:** Because what you have is the appointment by somebody who is ultimately responsible to Parliament.

**Q86 Mr Gray:** Yes, but I am talking about the relationship between the Secretary of State and this person, who wants to be independent and who may well be criticising the Secretary of State and the armed forces fundamentally. But if she or he knows that their job is dependent on the Secretary of State, might they not be inclined to be slightly nicer to the MOD than they would otherwise be?

**Anna Soubry:** I think that if you look at the evidence from Susan Atkins's appointment, you will see that she is expected to be—

**Q87 Mr Gray:** Yes, but I am talking about the rules that we are laying down here. What Dai Havard has elucidated is that the Secretary of State has quite a large part in this process. It is not an independent appointment with completely independent terms—the five years will not be on the face of the Bill, and so on and so forth. All those things are discretionary and will be done on the recommendation of the Secretary of State to Her Majesty the Queen. My suggestion is that, because of that, the person who is appointed will be, to a greater or lesser degree, answerable to the Secretary of State, who is the very person whom that person may be seeking to criticise or complain about.

**Mr Barlow:** The first ombudsman will be appointed for a five-year term and it will not be renewable, so, once appointed, there is no question of their having to worry about whether they are going to be reappointed.

**Q88 Mr Gray:** But the Bill does not say it is one term. You say that the Minister has said in the Lords that that is the case, but the Bill does not say it is only one term.

**Mr Barlow:** No, it doesn't.

**Anna Soubry:** The Bill does not need—

**Q89 Mr Gray:** Should it not do so? Why doesn't the Bill say that?

**Anna Soubry:** Because it is a contract.

**Q90 Mr Gray:** It may be a contract, but—

**Anna Soubry:** Also, I think the danger in legislation is that we are often overly prescriptive. We know what the terms and conditions are going to be, but we do not expect in legislation to set out and lay out the terms and conditions.

**Q91 Mr Gray:** We will come back to that in a minute. In answer to my suggestion that this person might be too answerable to the Secretary of State, Mr Barlow said not to worry about that because they know they cannot be reappointed. However, they do not actually know that, apart from by hearsay. The Bill does not specify it.

**Anna Soubry:** But they will know if it is part of their terms and conditions when they are employed.

**Q92 Mr Gray:** But if you are to satisfy me that the whole thing is not set up as a pat-on-the-head job, as it were, why don't you put these difficult terms and conditions in the Bill? I will come back to this in a moment.

**Anna Soubry:** I think we have explained why we do not want to do that in relation to the five-year term. This is no pat—

**Q93 Mr Gray:** Why not?

**Anna Soubry:** We have explained. We do not want to do it in legislation. It does not need to be done in legislation.

**Q94 Mr Gray:** I know you do not want to do it, but why do you not want to do it?

**Anna Soubry:** Because we do not think there is a need to do it. You disagree.

**Q95 Mr Gray:** Why don't you think there is a need to do it?

**Anna Soubry:** Because we do not believe there is a need to do it. It will be part of the normal terms and conditions upon which anybody is employed. I am sorry, but I thought you might agree that one of the dangers is that we have been too overly prescriptive when we have passed legislation in this place.

**Q96 Mr Gray:** Absolutely the contrary. The purpose of passing legislation in this place is to be prescriptive and to lay down in the most minute detail precisely what will then occur. For the record, the Minister is looking very quizzical and puzzled.

**Anna Soubry:** I am.

**Q97 Mr Gray:** She obviously thinks that she likes Henry VIII clauses. She likes the Secretary of State having authority and legislation being minimalist in its detail.

**Anna Soubry:** No, I don't.

**Q98 Mr Gray:** For the record, I entirely disagree with her. I think legislation should be absolutely detailed, so we know precisely what will happen.

**Anna Soubry:** So you think the legislation, Mr Gray, should include all the terms and conditions of the appointment of this ombudsman.

**Q99 Mr Gray:** That is not what I said, but let us move on. I am just concerned that, because it is not in the Bill, there may be some perception that the person is the creature of the Secretary of State.

Let me ask another question about the appointment. You are right in saying that this Committee will have the right to a pre-appointment interview. Will we have the authority to turn the person down?

**Mr Barlow:** As a matter of process, I do not think—

**Q100 Mr Gray:** Don't shake your head and whisper. This is a public hearing.

**Anna Soubry:** Mr Barlow is talking; that is why.

**Q101 Mr Gray:** But you were talking at the same time, Minister. This is a public hearing and we are broadcasting to the nation.

**Chair:** Order. Mr Barlow?

**Mr Barlow:** I don't think that that is what the process envisages. I would say that for the Ministry of Defence and, indeed, for this Committee, this is a new approach. We have not had direct experience on this appointment or any other. We would expect the Committee to question the prospective ombudsmen on their backgrounds and their suitability for the role and perhaps, if they saw fit, offer comments to the Secretary of State.

**Q102 Mr Gray:** Suppose we found that the background and suitability was not fitting and that this person was totally unsuitable. You are saying that even if that was the case, we still could not turn the person down.

**Anna Soubry:** That's right. The Secretary of State makes the appointment, but, as you know, Mr Gray—

**Q103 Mr Gray:** So what is the purpose of having a pre-appointment hearing?

**Anna Soubry:** As you know, when Secretaries of State make any decision, they often take the advice of Ministers. That is very important. This job has been advertised before, and I can assure you that the Secretary of State I had the pleasure to serve under wanted to know precisely my views on some of the potential candidates, and he took into consideration my and other Ministers' views. Equally, if it were the case that somebody was being put forward as the candidate and the Select Committee to a man and woman, even on a majority, had serious concerns—of course, it would have been a public hearing, so there would be a transcript and people could have heard it—we trust our Secretaries of State not to simply say, "I'd better bash on," and do exactly what they want to do. They will listen to others, and it will be a careful part of the consideration whether to make the final appointment, as I am sure you can imagine.

**Q104 Mr Gray:** Under the Bill, there is all sort of prescription under which the Secretary of State can make regulations. Why are the regulations not on the face of the Bill?

*Anna Soubry:* Again, because we took the view that this was the right way to do it.

**Q105 Mr Gray:** I'm sorry. If I ask a question, it is no good saying, "That is because I think that is the case." The question is why you think that, okay? We know you think that.

*Anna Soubry:* Do we think there is a need for it? No, we do not think there is a need for it. I don't know whether anyone else wants to add anything.

**Q106 Mr Gray:** Why do you not think there is a need for it? It is no good just repeating the situation. It should be on the face of the Bill, because I think that the more that people can agree to it in primary legislation, the better it will be and that leaving regulation up to the Secretary of State to make later is a weakness in legislation.

*Anna Soubry:* I shake my head, Mr Gray.

**Q107 Mr Gray:** It is no good shaking your head, Ms Soubry. Our great party, throughout the whole of the time we were in opposition, spoke strongly against Henry VIII clauses and spoke strongly in favour of having regulation on the face of Bills. So I asking you why, now, as a Conservative Minister of State you are saying that you would like to see the regulations not on the face of the Bill.

*Anna Soubry:* You make a very good point about the over-reliance on secondary legislation, statutory instruments and so on and so forth. I completely, totally and utterly agree with you. However, in this instance, because we have published the regulations—

**Q108 Mr Gray:** Have you?

*Anna Soubry:* Yes, we have. We have published the regulations. Forgive me. When it started off in the House of Lords, one of the things that I certainly said—

**Q109 Chair:** Sorry, many apologies, Minister. The Committee, at least myself as Chairman, was not aware that you have published the regulations.

*Anna Soubry:* I am so sorry. You should have—

*Mr Barlow:* The draft regulations were published for the Committee stage in the Lords—

**Q110 Chair:** As the Joint Service Publication?

*Mr Barlow:* No, no. They were submitted to the House in the normal way as draft regulations to support the debate. The undertaking that has been made is that, in their final form, they will be subject to parliamentary procedure in the normal way.

**Q111 Chair:** I am probably being dumb here, but are the Defence Council regulations also being published?

**Mr Barlow:** At this stage, we have simply got to our drafts of the secondary legislation. The draft regulations are in the form that will need to be approved by Parliament.

**Q112 Chair:** Will the Defence Council regulations also be published before—

**Mr Barlow:** Do you mean the Joint Service Publication that gives guidance—

**Q113 Chair:** The regulations on the Defence Council, specifically.

**Mr Barlow:** What's binding on the Department—that is part of the draft regulations. It includes draft regulations for the Department and for the ombudsman.

**Q114 Chair:** Okay. Many, many apologies. The bell is ringing. We appear to have a Division. We shall therefore suspend our Committee hearing for 10 minutes.

*Sitting suspended for a Division in the House.*

*On resuming—*

**Q115 Chair:** Do the Minister's team know where the Minister might be?

**Sir Bob Russell:** She was at the vote.

**Mr Barlow:** I don't think she has gone far.

**Q116 Mrs Moon:** Perhaps we can clarify something with Mr Barlow, because he was answering the question. The Bill talks about Defence Council regulations. Are they the same as the draft Armed Forces (Service Complaints) Regulations, the draft Armed Forces (Service Complaints Ombudsman Investigations) Regulations and the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations, or is there another set of regulations yet still to be published?

**Mr Barlow:** No. We published three sets of draft regulations. I am just trying to find the headings. The draft Armed Forces (Service Complaints) Regulations refers to: "The Defence Council, in exercise of the powers conferred...makes the following regulations". In shorthand, they are the Defence Council regulations.

**Q117 Mrs Moon:** Thank you. Then there was the question of the Joint Service Publication. Will that be published before the Bill reaches the Commons?

**Mr Barlow:** No.

**Q118 Mrs Moon:** Why not?

**Mr Barlow:** Well, the Joint Service Publication, in the new form that JSPs have to take, will be in two parts. Part A will essentially set out what is required by law, and we will not know that until the Bill has completed its passage through the House. Part B will set out guidance on how the law is to be interpreted, the workings of the procedure in detail and the relationship with other parts of the departmental process. Simply, we won't draft that until later on in the process, as we get closer to implementation next year.

**Q119 Mrs Moon:** Am I right in my assumption that the Joint Service Publication will be where the definitions of maladministration, or where arguments in relation to maladministration, will be found?

**Mr Barlow:** There will be a description of maladministration, which will be very similar to the description that has been adopted by Ministers throughout. It is in common usage, but not a legal definition.

**Q120 Mrs Moon:** If the Joint Service Publication contains details of the process to be followed, and it is the failure to follow the process that defines maladministration—*[Interruption.]* Is that right? The Minister is shaking her head. I wish the Minister would speak rather than shake her head. The recording instruments don't get head shakes.

**Anna Soubry:** Maladministration is not just about process, as I explained earlier.

**Q121 Mrs Moon:** So will the details contained in the Joint Service Publication have any impact and influence on the ombudsman's ability to judge whether there has been maladministration?

Anna Soubry: It shouldn't. Why would it? We want this. We will make it very clear as to what we are seeking to achieve. I can't envisage that we would want, in any way, to row back on our intentions in any subsequent publication of rules, regulations or anything else. We have made it very clear what we want this role to be.

**Mr Barlow:** Clearly, it will not be at odds in any way with the regulations laid out before Parliament, but it will contain details of precisely who the complaints should be made to and details of handling. If we don't follow our own processes, as laid out in the Joint Service Publication, that could be one reason for a complainant suggesting that the process has failed in some way. But there could be many other reasons why maladministration might have taken place. It would be up to the ombudsman to determine what weight to put on such failings if they occur.

**Q122 Mrs Moon:** Thank you. Will the new model take account of the different processes within the three services for handling service complaints?

**Mr Barlow:** What we are trying to do here is set a generally applicable framework, but allow a little bit of variation to take account of culture and practice in the individual services. If it would be helpful, I am sure that the other three witnesses could talk a little bit about how that works at the moment, in terms of the differences between the three services. But they should not be substantial, and they should still enable us to operate a complaints system that is essentially the same for all personnel, whichever service they are serving in, including in joint units and headquarters.

**Q123 Mrs Moon:** We have, helpfully, been provided with a flow diagram. Perhaps it would be more appropriate if the three services could send us their processes, so that we can compare with the flow diagram that we have and see where the differences take place. Is that possible?

**Mr Barlow:** At the level of that flow diagram, it will be the same.

**Brigadier Donnelly:** We follow the same broad process, but because of our structural differences—different authorities are held at different ranks—we would often make decisions at different levels.

**Q124 Mrs Moon:** If we can have a copy of that flow diagram, so that we can see how decisions are made within the three services, how they differ and who makes what decisions, that would be helpful. Is that possible?

**Mr Barlow:** We may be able to attempt it. I am not sure if we can do it.

**Brigadier Donnelly:** Not really, because every complaint is decided on a case-by-case basis.

**Q125 Mrs Moon:** Given that we have a lot of questions to ask today, are you suggesting that we avoid the questions and just listen to evidence about how you process a complaint? Or don't you have a flow diagram that can show us how you process your complaints?

**Mr Barlow:** We have, and we have submitted that to you.

**Mrs Moon:** No; if you are saying that the individual services operate on a different basis and that decisions are made at different levels, that must be a variable on a flow diagram by each of the services?

**Q126 Chair:** May I come in there? We took witness statements from Colonel Field who said that the divergence was most striking by the time the complaint had reached the top: the Army Board, the Air Force Board. It was at that moment that it seemed to him that the systems diverged most dramatically. He certainly argued when giving evidence to us that there would be a good case for bringing things together at that level.

**Mr Barlow:** I think Colonel Field's evidence might be impressionistic on that. One thing we know is true of the difference between the three services is, for example, that the Army tends to have more oral hearings than the other two services, particularly at level 3. But that is not a binding process in that sense. The process itself in our policy and procedures is flexible enough to allow for that if the individual case requires it. The Army happens to make different judgments about how often to proceed down that path. I don't know if John wants to say any more about that.

**Q127 Mrs Moon:** I am sorry, Mr Barlow, can I just take this back? If you cannot tell this Committee what the process is for each of the three services when dealing with and handling complaints and give us a flow diagram, how is the ombudsman going to know and understand what the differences are? You are suggesting that unless we have a seminar on the differences between the three services, we won't be able to see the flexibility within the systems. The individual who wants to make a complaint needs to know what the differences are, as does the ombudsman. Can you provide us with that information?

**Mr Barlow:** My response, Mrs Moon, is that the differences are simply not significant at that level. They are differences of minor practice; they are not differences of the process shown in that flow diagram at all; they are identical.

**Q128 Mrs Moon:** Then there should be no reason why you can't provide us with that information, surely.

**Anna Soubry:** He has done. He has given you the oral information that there are no significant differences. That is the fact. You can ask the representatives of all three services, and they will say whether that is right or wrong.

**Q129 Chair:** Could we then just request that, in written evidence after this sitting, we get a note from the three services on what exactly those differences are—granted, Mr Barlow, that they are minor?

**Mr Barlow:** We will try to do that in terms of illustrating what the minor differences in practice might be within the individual services.

**Q130 Sir Bob Russell:** My understanding is that under the one before the last Armed Forces Bill of 2004-05, when I was on that Bill Committee, the idea was to bring together all the disciplinary procedures, so that differences were minor to non-existent. I would hope that is the case.

**Anna Soubry:** Do you want to answer that?

**Commodore Spence:** That really is the case. At the risk of repeating what has been said, I do not think, with the evidence that you may have heard or interpreted, that there is some vast difference between light and dark blue and khaki and how they deal with it. It is actually prescribed under the Armed Forces Act 2006 how we are supposed to deal with the process. We can't diverge from that. There is no little sub-process that any of the services can adopt, because to do so would break the law. We have come to our own individual practices within that framework, so that if we can see a quick win, we will in the Navy short-circuit the system, as we have done for a while, to get an early decision and so on. You know about that, Mrs Moon.

**Q131 Mrs Moon:** I do, and that is all I am asking you to set out. I don't think I am asking for a seminar. I am merely asking to have the differences between the ways the three services do it. Thank you.

**Commodore Spence:** Fine.

**Q132 Mr Gray:** Can we come on to new section 340E? The explanatory notes attached to the Bill say that "Independent members may be required in a number of circumstances for decisions on service complaints and appeals." What are the circumstances? What are the criteria for inclusion of independent members?

**Mr Barlow:** For independent members, it will in the first instance be a judgment for the complaints secretariat in the three services. Normally, the practice would be to appoint independent members in cases where bullying, discrimination or harassment was involved, if not at the first stage of decision making, certainly at the second.

**Q133 Mr Gray:** Right. So it still the same; those three things predominate.

**Mr Barlow:** It is very similar to now.

**Q134 Mr Gray:** How many independent members do you have on the books? How many will you need?

**Mr Barlow:** We have about half a dozen on the books at the moment, and we will keep under review whether we need more than that.

**Q135 Mr Gray:** Given the number of cases that you anticipate the ombudsman will handle, can't you estimate how many independent members you will need? Six doesn't sound like very many.

**Mr Barlow:** Well, it is certainly enough at the moment. It is one of the things that we will keep under review as we approach implementation next year, but there is certainly no point in having any more now. It does not take that long to run the competitions to deliver additional members, and I would expect that, next year, as part of our implementation planning, we will have a pass over of that, including in consultation with the existing panel members to discuss their work load and how they anticipate that increasing.

**Q136 Mr Gray:** Sure. What sort of people are the independent members?

**Mr Barlow:** They come from a range of backgrounds. They are typically people who have had some kind of experience in other complaints handling environments: the Nursing and Midwifery Council or lay members of the General Medical Council and so on. They will have come from public and private sector and other backgrounds.

**Q137 Mr Gray:** Are they specifically not ex-military?

**Mr Barlow:** No. They tend not to be—I do not think that any of the current group are—but I do not think that that is a specific bar in the selection process. But, as with the appointment of the ombudsmen or the current Commissioner, anyone with recent military experience would probably not be chosen.

**Q138 Mrs Moon:** The Bill's intention is that the service complaints ombudsman is limited to investigating a complaint of alleged maladministration and not the substance of the original complaint. Other ombudsmen have the power to investigate service failure in addition to that. Why is the service ombudsman not to have that capability?

**Mr Barlow:** Fundamentally, this is an internal complaints system. Other ombudsmen would often be looking at the provision of services to the public, but this one does not.

**Q139 Mrs Moon:** So you are saying that, because armed forces are seen as internal to the military, they do not have the right to the same level of service failure investigation as members of the public.

**Mr Barlow:** It is simply a different role in that sense. In terms of whether the ombudsman should have the powers to investigate the substance of the complaint rather than maladministration and the injustice that might have resulted from that, that comes back to the heart of the proposition of what the complaints process is about and who should be responsible for what. As I think the Minister explained at the beginning, this process is designed to strike the correct balance between the responsibility and accountability of the chain of command and an external check. That is what is described in the legislation.

**Anna Soubry:** I was going to add—principally to remind everyone—that service personnel’s employment is unique, because of the chain of command. At the same time, we need to ensure that when someone has made a complaint where they believe there has been maladministration, we have a robust and independent system so that balance is properly struck. That is what this Bill achieves: that right balance. Because our service personnel are uniquely employed—no one else has the same system, for want of a better word, in terms of their employment—there is no comparable group of workers.

**Q140 Mrs Moon:** There is a comparable subset of workers in the armed force personnel of other nations. Among the nations who have ombudsmen, we are unique in having the ombudsman able to look only at the internal processes of the Ministry of Defence. The other ombudsmen are able to look at service failure. Why have we not followed the same line as other armed forces ombudsmen and enabled the ombudsman to look at service failure?

**Anna Soubry:** I don’t think that the ombudsman does look at the internal detail of the Ministry of Defence. What the ombudsman will do is look at the handling of a complaint that has been made to make sure that it has been handled properly by whichever of the three forces has had that person within their employ. As I say, I think that this strikes the right balance to achieve what we all want to achieve. That is why I am content, notwithstanding how others have set up their systems, that we have the right balance for what we need. I don’t know whether Gavin wants to add anything about other countries.

**Mr Barlow:** Of course, we are aware of the systems that have been put in place in other countries. They haven’t been a focus of the work that we have done with the Commissioner and others to review the arrangements in a way that has led to the proposals in the Bill. The Government have taken a view that, in general, supports the views of the Chiefs of Staff on the right balance to strike within the complaints system, with a view to underpinning operational effectiveness and, as part of that, the role of the chain of command. Some other countries—not all of them—take a different view.

**Q141 Mrs Moon:** So the priority is the view of the chain of command.

**Mr Barlow:** This is fundamentally about maintaining the operational effectiveness of the armed forces, ensuring that the chain of command does its job properly and having an external check to assist with that. It’s hard to be accountable for the decisions that other countries make on how they set up their own systems. One of the points I would make on that is this: the Germans clearly have a quite distinctly different system; so do the Canadians and the Australians. As I say, we are aware of that. It becomes quite difficult then to compare the effectiveness of the different approaches.

**Q142 Mrs Moon:** You will be aware that the institute of armed forces ombudsmen in Geneva has compared them and describes the UK as unique in terms of the role of the armed forces ombudsman and the limitation of the areas in which complaints can be investigated.

**Mr Barlow:** Yes, but that is not the same thing as a judgment that our system is in some way worse. It’s just different, and perhaps uniquely so, but it stands on its merits.

**Anna Soubry:** I think it’s also very important for me to add, as somebody who is just the Minister in the sense that I am not a member of the armed forces, obviously, that one of

the things that really strikes me is that all three of our armed forces absolutely want a good complaints system, because at the end of the day, if they are to deliver what they have to deliver—an effective force—and do a proper job, they want soldiers, sailors, airmen and women and marines who are all happy and content in their work. I know it may be a statement of the obvious, but if your work force are not happy and content, they don't do a good job.

**Q143 Mrs Moon:** The regulations say that complaints should be “in writing”, but that writing also includes electronic communications. Should that not be on the face of the Bill? The face of the Bill says it needs to be in writing, but the regulations say that “in writing” can include electronic communications. Should it be on the face of the Bill?

**Anna Soubry:** Is it not just the definition of “writing”? That's why it is done in that way. Lots of statutes will use a word and then, in another way, define it. What is important is that everybody knows how to do it; and it's there and it's clear in the regulations that writing also includes electronic communications.

**Q144 Mrs Moon:** The regulations also say that the ombudsman may accept out-of-time applications where it is “just and equitable” to do so. Should that not be on the face of the Bill?

**Mr Barlow:** We think that is a matter of procedure, but we do think we should be a bit more explicit that it's the ombudsman's judgment whether it is equitable to do so. We could probably make that clearer in the regulations.

**Q145 Sir Bob Russell:** Minister, why does the Bill provide for the Secretary of State to “make regulations about the procedure to be followed” by the ombudsman in carrying out the investigations? Would you not agree that this undermines the independence of the ombudsman and will reduce confidence in the service complaints system?

**Anna Soubry:** No. I think it's important that it is the Secretary of State—having considered and discussed this with people in the way I described before—who sets down how the ombudsman will operate and therefore lays down the regulations. I have no difficulty with that whatsoever. That then sets the parameters by which he or she can operate. It's tested by this Committee, for example, and in other ways to make sure we get what we would want from an effective system.

**Q146 Sir Bob Russell:** This is not about the regulations; it's about the procedure. I understand what you're saying about the parameters, but surely the independence of an independent ombudsman is that he or she decides what the procedure will be within the regulations and parameters. To actually dictate to the ombudsman how the process is done is surely an infringement on the independence of the ombudsman.

**Mr Barlow:** It's certainly not intended to be. I think the approach we've adopted is fairly typical of the approach for regulating other ombudsmen. We have to have something to make clear who is responsible for what within the process. The detailed procedural rules to be adopted by the ombudsman would be a matter for the ombudsman, and we would expect them to publish that independently.

**Q147 Sir Bob Russell:** That's encouraging. I would suggest that the Bill needs to allow for that, because I am advised that, at the moment, it says the Secretary of State will make the regulations about the procedure to be followed. There's no flexibility there.

**Mr Barlow:** The regulations are the ones we've published in draft and, as I say, are intended to be a basic framework rather than give full detail.

**Q148 Chair:** It is specifically 340I(2) which gives the Secretary of State the power to make the regulations. That is inconsistent with the powers currently given to the Parliamentary Commissioner, the health commissioner and the local government ombudsman. We would therefore be proposing, as a Committee, that that should be amended. The amendment that we would be proposing would say that the procedure for carrying out such an investigation is such as the ombudsman considers appropriate in the circumstances, rather than the Secretary of State for Defence. We wanted to give you a chance, before we propose that, to say whether there is some fundamental problem with bringing this into line with those other ombudsmen.

**Mr Barlow:** I'm very happy to go away and look at the practice in those specific cases, but I couldn't answer that in detail now.

**Q149 Sir Bob Russell:** But in your last answer to me, you indicated support on the lines of the Chair's question, so there should be a huge open door there for you now. I would now like to move on to new section 340L(7)(c), which enables the Secretary of State to make regulations about obligations, including those of confidentiality, that may be imposed on those who receive the ombudsman's report. Will those powers simply undermine confidence in the powers and independence of the ombudsman and the system as a whole?

**Mr Barlow:** We don't think so. We should bear in mind that this is an internal complaints process that will involve a number of different parties, and maintenance and confidentiality is typical in such processes. We would expect the ombudsman, in making his or her reports, to abide by those requirements for confidentiality. But it is about confidentiality for individuals and also, in certain circumstances, to maintain the security of particular classified information. It is not intended to fetter the ombudsman's ability to publish judgments about what is or is not wrong with our complaints system or instances of maladministration that have been found and need to be made public within the annual reporting process or, indeed, elsewhere.

**Q150 Sir Bob Russell:** That detailed response indicates that a lot of thought has gone into this matter. What other obligations are envisaged that the Secretary of State may impose under new section 340L(7)(c)?

**Mr Barlow:** Nothing beyond really what I have just talked about—I am trying to refresh my memory on whether the regulations set that out in any more detail already.

**Q151 Sir Bob Russell:** So you do not envisage any other obligations?

**Mr Barlow:** The regulations associated with that are set out in regulation 9 of the ombudsman regulations. I am conscious that Committee members may not have that in front of them, but there is a list, essentially.

**Q152 Sir Bob Russell:** So there are some?

**Mr Barlow:** Yes. So, “If a report prepared by the Ombudsman under section 340L of the Act...mentions the name of any person other than the Defence Council, or...includes any particulars which, in the opinion of the Ombudsman, are likely to identify any such person and which in the Ombudsman’s opinion can be omitted without impairing the [effectiveness] of the report, or...includes any information which, in the opinion of the Ombudsman, it would be against the interests of national security to publish, that information must not be included in a version of the report sent to any persons in accordance with section 340L(6) of the Act, unless the person or, for information referred to in sub-paragraph (c), the Secretary of State consents.” That is the detail.

**Commodore Spence:** It is protection of personal information—

**Q153 Sir Bob Russell:** Protection? Okay; thank you. I want to move on to another question, Minister. In her memorandum, the Service Complaints Commissioner states that “where there has been maladministration and actual or potential injustice, the Ombudsman’s finding will be binding”. Do you agree with me that that should be set out much more clearly in the Bill?

**Anna Soubry:** No, because I think the Bill strikes, as I said before, the right balance that we are seeking to achieve.

**Q154 Sir Bob Russell:** But the Service Complaints Commissioner says “the Ombudsman’s finding will be binding”—it “will” be binding. Should that “will” not be set out more clearly? It is not “maybe”, “could be” or “possibly”—it “will” be.

**Chair:** I am sorry to come in again, Sir Bob. Specifically, Sir Bob’s question refers to section 340M in the Bill. It currently says that the Defence Council must consider the report, notify the ombudsman and if the council decides to reject a recommendation, notify the ombudsman. What Sir Bob is proposing is that instead of having the power to override the ombudsman’s recommendations, the Defence Council should accept the ombudsman’s recommendations. That has been the argument made by a number of witnesses who have come to us, so we were suggesting that in line 15, you should insert “accept the findings and recommendations of the Service Complaints Ombudsman”. It would be interesting to know why you do not wish to accept—

**Mr Barlow:** Perhaps what needs to be done here is to draw a distinction between findings and recommendations. Again, in this, we are following case law for other ombudsmen. The findings of the ombudsman will be regarded as binding, so a finding that maladministration has occurred is binding on the Department. Recommendations on what to do about that, in terms of redress or procedural change, are just that—they are recommendations. I gather that there has been recent case law on that in relation to other ombudsmen clarifying the extent to which a public body receiving such recommendations can interpret them. It may be that the ombudsman would make recommendations that simply cannot be implemented within the powers of the Department, or that for some other reason might be inappropriate to meet. But clearly, any decision that the Department makes about how to interpret and implement a recommendation can ultimately be subject to the courts in the normal way. What we have said consistently is that it would be very unusual simply to ignore or disagree with the ombudsman’s recommendations without very good reasons, which we would normally communicate, to the ombudsman in the first instance.

**Commodore Spence:** To amplify Gavin's point at the end there, if the Department is not accepting recommendations of the ombudsman, the case law states—the wording is—that we have to give “cogent reasons” for not accepting recommendations made by the ombudsman.

**Q155 Sir Bob Russell:** So it is goal-line technology, is it? In other words, you are seeking someone else's information to overturn or not agree with what the ombudsman has concluded.

**Mr Barlow:** No—

**Sir Bob Russell:** If you do not accept the ombudsman's decision as binding, you are trying to find a way of not accepting what the ombudsman has found.

**Mr Barlow:** No, I do not think that is true. I come back to the point that this is precisely the same legal framework that is applied to other ombudsmen, governed by the courts. It is not meant to enable the Department to wriggle out of complying with recommendations, but to allow sensible room for interpretation so that they can be properly implemented.

**Q156 Sir Bob Russell:** We will move on. Minister, in answer to the first question, you made reference to it not necessarily being about ticking the right boxes, or whatever the correct quote was. My question is a somewhat involved one. Regulation 6(c) in the draft Armed Forces (Service Complaints Ombudsman) Regulations provides for the ombudsman to proceed with an investigation and preparation of a report if documents or other information he or she may have required to be provided are not provided within the period that the ombudsman deems reasonable, or in the form or manner requested—that is the “ticking the right boxes” aspect. What is the purpose of this provision? Will it not discourage people from providing documents and information required by the ombudsman in a timely manner or in the form requested?

**Anna Soubry:** I am sorry, I cannot find that—[*Interruption.*] And your point is?

**Sir Bob Russell:** My point is that you said quite clearly in answer to question 1 that this is not about ticking the right boxes, but to get the information. I am asking the question because there are lots of ifs and buts there, and people may not necessarily get the information in the prescribed way and in the prescribed time.

**Anna Soubry:** Forgive me, when I was saying “ticking boxes”, I meant that when the ombudsman looks at a complaint, he or she is not going to go through asking, “Was this done?”, “Was that done?”, “Was this time limit complied with?” and so on and so forth. It is more than just looking at such things when deciding whether there has been maladministration. That was my reference to box ticking. Forgive me if I did not make that clear.

**Q157 Sir Bob Russell:** That's fine. In response to my question and what I have just said, will that not discourage people from providing documents and information required by the ombudsman in timely manner or in the form requested? In other words, are they being put off?

**Anna Soubry:** No.

**Mr Barlow:** No. Quite the reverse. The regulation is permissive, so it is enabling the ombudsman to proceed even if the submission of the documents is delayed. That is all that it is doing.

**Sir Bob Russell:** So it is a positive rather than a negative.

**Anna Soubry:** Yes, very much so.

**Q158 Sir Bob Russell:** You may well have answered part of my next question, which was about new section 340M not including provisions to make the ombudsman's recommendations binding—that was, I think, what the Chair asked, so we have rehearsed that one, although the Committee may in due course revisit it with a recommendation. I do not know.

My final question, Ministers, is, notwithstanding that, if people know that the decision is not necessarily binding, will that not impact on confidence in the effectiveness, fairness and efficiency of the service complaints system?

**Anna Soubry:** No, I don't think it will. There will be confidence that there will be a rigorous and independent look at the way complaints were handled and, should it be determined that there was maladministration, that will not in any way be ignored, but will be taken very seriously. I hear what you are saying about the recommendations and whether things should be binding. I refer again to the fact that we are trying to make sure we maintain the chain of command, which is incredibly important.

One of the things we perhaps forget is that the service complaints ombudsman prepares an annual report. You have to look only at the robust way in which Dr Susan Atkins prepared that report in the past. She did not hold back in any way, shape or form when she thought criticisms should be made. That is why we are so keen to ensure we get someone of her rigour, not just her independence. She is prepared to say exactly what she believes, which then goes out into the public domain. I think that feature, which will be retained, is incredibly important, and perhaps we have not paid attention to it.

**Q159 Chair:** Minister, I am aware that you need to go, but unfortunately we lost you for 15 minutes.

**Anna Soubry:** No, I don't need to go. I am all right.

**Chair:** Thank you very much. That would be fantastic.

**Q160 Derek Twigg:** Minister, will the ombudsman be able to produce a thematic report under new section 340O of the Bill, and will they be able to initiate their own report on any part of the service complaints system, or will the reports have to be requested by the Secretary of State?

**Anna Soubry:** As I was saying, the ombudsman herself or himself is able to produce a rigorous annual report. One of the things that perhaps needs to be explained, which I didn't know until I came into this job, is the fact that, on the basis that we have somebody

rigorously independent, it is not only my door that is open. Dr Atkins comes to see me, and perhaps more importantly, she goes to see the Secretary of State if she needs to have a rigorous conversation with him about things she is discovering—I will put it that way. It is absolutely the case that if the ombudsman looks into a number of complaints and forms the opinion that there is a nexus between them that may mean that something, somewhere is going horribly wrong, she will not hesitate to take that up at the most senior level. She has the ability, in any event, to put it in her annual report, but before that she has the ability to speak out about it and make her concerns clear. It doesn't need to be in legislation.

**Q161 Derek Twigg:** So, are you saying on record that the ombudsman will be able to initiate their own reports on any part of the service complaints system, and it will not have to be requested by the Secretary of State? Can he or she on their own initiative actually request a report?

**Anna Soubry:** I don't know whether she requests a report.

**Derek Twigg:** Can they initiate a report? Will they be able to do that? Can we be absolutely clear, so we know?

**Mr Barlow:** The distinction, I think—

**Derek Twigg:** It is not a distinction; it is a simple question.

**Mr Barlow:** Well, the distinction, I think, is between reports and inquiries. The ombudsman certainly can include any commentary they want on the operation of the system or the themes they have encountered during their assessment of complaints in their annual report and, if they wish, in other publications. The question is whether they have the power to conduct thematic inquiries—

**Derek Twigg:** Yes.

**Mr Barlow:** And they don't.

**Anna Soubry:** There is a distinction. Perhaps I didn't make that point as well as I would have liked.

**Q162 Derek Twigg:** Just to be clear for the record, tell us what the difference is between a thematic report and an inquiry. It is not clear, and I want to make sure we know exactly what the difference is.

**Mr Barlow:** The ombudsman is supplied with information via the Department about the operation of the complaints system. They will encounter a wide range of different complaints and will have a lot of contact with members of the armed forces and the Department as they go about their business. From that, as we have seen with the existing Commissioner, we would expect them to comment widely on the operation of the system and, if they wish, to identify specific themes of concern to them. We are talking about a thematic report—I think that would be that. Within their report they might include some analysis of the statistics they get that would enable them to comment on what is going on in the complaints system. They will not have the power to pursue witnesses and documentation in the way they would for dealing with maladministration in the context of a complaint.

**Anna Soubry:** To be clear, the ombudsman cannot initiate an inquiry but that does not preclude him or her from highlighting and bringing to everybody's attention any suspicions or concerns that they have, based on their work, that there is something that requires others to make some sort of inquiry. There is a big distinction between the two. If you stop and think about it, this person, if he or she believes that something bad is happening in a particular unit, would almost have, if not a duty of care—the calibre of person that we would want to appoint is like Dr Atkins; if she thought that something untoward was going on somewhere, it is inconceivable that she would not be saying something about it and demanding a meeting with the Secretary of State or whoever. That rigour is there, but that does not mean that the ombudsman should have the power to initiate their own inquiry and, as Gavin explained, call witnesses, summon documents and everything else.

**Q163 Derek Twigg:** But they can produce a report.

**Anna Soubry:** They do an annual report.

**Q164 Derek Twigg:** Does she or he have the power to produce a report on any part of the complaints system?

**Anna Soubry:** A report can be an oral report and it can be—

**Q165 Derek Twigg:** Let's get it clear. It could be written or oral—does it matter either way?

**Anna Soubry:** If she has concerns—

**Derek Twigg:** Is that written, oral or both?

**Anna Soubry:** If he or she has concerns—I don't know whether it has to be in writing or not and, quite frankly, I don't think it particularly matters—

**Q166 Derek Twigg:** Can it be called a report?

**Anna Soubry:** Hang on. What matters is that that person is of the rigorous independence that they can go as, indeed, they do now and speak to the Secretary of State, raise it with whichever of the armed forces it may be and so on and so forth, with Chiefs of Staff or whatever.

**Q167 Derek Twigg:** The problem is that we are trying to ensure that the system has clarity and that we all know what it can and cannot do, so just for the record again: can the ombudsman produce a report on any part of the system that they have a concern about or does it have to be requested by the Secretary of State? The answer is—

**Anna Soubry:** No. Does it have to be requested by the Secretary of State? No, absolutely not.

**Q168 Derek Twigg:** So the ombudsman can request the report.

**Anna Soubry:** No, she would make a report, not request a report. That is a different question. Forgive me.

**Q169 Derek Twigg:** Can the ombudsman initiate their own report? Let's be clear about it.

*Anna Soubry:* She can report. Yes, absolutely.

**Q170 Derek Twigg:** Can he or she initiate their own report?

*Anna Soubry:* If she is making the report, she is initiating that report.

**Q171 Derek Twigg:** On any part of the complaints system, without the request of the Secretary of State?

*Anna Soubry:* I don't see why he or she wouldn't, if they go to the Chiefs of Staff or go to the Secretary of State.

**Q172 Derek Twigg:** Okay. We're clear on that. They can do that.

**Q173 Mrs Moon:** Can I be clear: do you think this would be a report or an inquiry?

*Anna Soubry:* We have been very clear about that.

**Q174 Mrs Moon:** Let me just finish. You are aware that I have raised concerns in the Chamber in relation to more than 1,400 armed forces personnel who were subject to double punishment when they had a police caution. They were subject to further punishment between 2008 and 2011, which was illegal. Some were demoted, some were fined and some were discharged from the armed forces. The British Army policy briefing of November 2011 said that, "The longer we take no action the fewer the 'in time' complaints about other sanctions there will be. MOD policy may not be to accept out of time complaints on this issue." If an MP wrote to the Service Complaints Commissioner, would they be able to issue a report or carry out an inquiry into that? How do failures to find and redress a grievance get brought to the attention of those who have been wrongly punished, if the Commissioner or the ombudsman cannot carry out such inquiries?

*Anna Soubry:* This is for individuals who have raised a complaint which they do not believe has been properly dealt with to take it to another body. This is not about Members of Parliament who may have a very just grievance about the treatment of a group or a number of their own constituents and how they then bring that to the attention of those who are responsible for what they allege to be a grievance. This is part of the complaints procedure. This is about individuals who have made a complaint—usually it is about their allowances and so on—and who feel that their complaint has not been dealt with in the right and proper manner and therefore go to the ombudsman. What you describe is something completely different and it is not part of this system.

**Q175 Mrs Moon:** Can we just be clear? First, MPs can take issues to the ombudsman. Secondly, in this particular case people are in a Catch-22: the information is being kept secret so they cannot make a complaint because they do not know that they have been wronged.

*Anna Soubry:* I don't know, Mrs Moon. You know my views on all of this. Truthfully, I think this is a red herring. Perhaps you might be able to put it better than I can.

**Mr Barlow:** Clearly the proposals in the Bill are not about giving the ombudsman powers to investigate historic wrongdoings. They are about giving the ombudsman powers to investigate live complaints. It is difficult to speculate on what the ombudsman's role would be if that situation or something similar had occurred again. Presumably individuals would make complaints if they felt they had been wronged and the ombudsman would investigate if those complaints were not upheld by the Department.

**Q176 Mrs Moon:** So she could investigate?

**Mr Barlow:** If there was a complaint, and it was not time barred, and the complaint was not upheld by the Department, and the individual wished to take it to the ombudsman, then, yes, that is the point at which the ombudsman investigates.

**Mrs Moon:** Catch-22.

**Q177 John Woodcock:** I apologise for having missed the start of the session. As a final follow-on from that, all the examples you gave, Minister, were about reporting the issue that the ombudsman had tackled internally to service chiefs or to the Secretary of State. Do you see that as the limit of the reporting power rather than publicising whatever has been investigated? Would it automatically be published when a report has been made?

**Anna Soubry:** She publishes an annual report.

**Q178 John Woodcock:** That is slightly different. An annual report can be an aggregation of the number of issues that have been dealt with.

**Anna Soubry:** But it isn't.

**Q179 John Woodcock:** It is not the same as transparency over—

**Anna Soubry:** But it isn't. It is her report or his report. We know exactly the rigorous way that our current Complaints Commissioner has reported. It is a public document. In it she makes clear what she has dealt with and she gives her views. She has made her views very clear and has not held back in criticising the forces for not dealing with complaints notably quickly enough.

**Q180 John Woodcock:** So, your clear view is that that outward-facing reporting to the public and to Parliament needs to come on an annual basis and should not be ad hoc or when individual issues arise that she is concerned about.

**Anna Soubry:** I think we are making this over-complicated. Forgive me. Let us look at it this way. We have a human being who we are confident has the rigour and the independence not to shy from taking the sort of attitude that I have described. It is in my view inconceivable that if she thought or he thought that something inherently wrong was going on somewhere, they would not do everything that they could, if for perhaps no other reason than to protect people who they might think are in danger or at risk of something. That is the reality of it. The idea that because it is the service complaints ombudsman they are somehow stripped of the sort of common-sense approach to things that anyone else would have is not the right way of viewing it. This person is not constrained. That is why we created this role. I

said at some stage in my evidence to you that what all three forces want is to have a work force that is happy and content so that they do the job that they are meant to do.

**Q181 John Woodcock:** That is very helpful. Presumably, if he or she thought it was appropriate to speak publicly, they would be free and welcome to do so?

**Anna Soubry:** You have the Bill in front of you and you know that there is nothing there to constrain that person at all, as, indeed, you would expect.

**John Woodcock:** Good. Thank you.

**Q182 Chair:** Could I just really pin it down? I am right, Gavin, aren't I, that the ombudsman is not in a position to carry out an investigation of any allegation of systematic abuse or injustice if it appears to him or her to be in the public interest? In other words, your Bill does not follow the recommendations that this Committee made in April 2013 to allow the ombudsman to pursue what we would call thematic issues.

**Mr Barlow:** Correct.

**Q183 Chair:** In your response in April 2013 you said that the Government were looking at the Committee's recommendation. I have heard you were quite favourable in your response then. What changed between April 2013 and today to lead you into a position where you have decided to ignore the Committee's recommendation on thematic investigations?

**Mr Barlow:** May I answer this?

**Anna Soubry:** Please do, because you know more than I do about this.

**Mr Barlow:** I don't think the Government have ever adopted a favourable or unfavourable view—or hadn't at that point—on the question of thematic inquiries. What we committed to was a process of dialogue with the current Service Complaints Commissioner about her recommendations that we pursue an ombudsman role. There were quite a wide range of possibilities that we could have pursued at that point—quite a wide range were raised by the Commissioner herself in her reports.

**Q184 Chair:** I am sure that is true, but my question was that we made a specific recommendation as a Committee in April 2013. Why did you choose to reject our recommendation? I understand you receive many recommendations from many people, but why did you specifically choose to reject our recommendation?

**Mr Barlow:** Because the approach that we adopted was one that, from the outset, attempted to strike the correct balance between maintaining the authority of the chain of command and operational effectiveness and the powers of the ombudsman—

**Q185 Chair:** Why would a thematic review undermine the authority of the chain of command?

**Mr Barlow:** If you move from a system that is fundamentally about an approach to dealing with individual workplace complaints to something that is more like an inspectorate that has its own powers to conduct inquiries into the matters that it chooses, that will have a

fundamental impact on the operation of the armed forces and the chain of command. That is the judgment that the Chiefs of Staff would certainly make, and that the Government would make.

**Q186 Chair:** If we take Madeline Moon's case, let's say that they wanted to do a thematic investigation into the question of double punishment for people who had received police cautions; why would that undermine the authority of the chain of command?

**Mr Barlow:** I imagine that some inquiries might and some might not—

**Q187 Chair:** Could you give us even a hypothetical example of an inquiry that might undermine the chain of command? We are trying to understand in concrete terms why this thing is a threat to the chain of command. Can you give us an example?

**Mr Barlow:** It is the chain of command that should be responsible for the welfare of their people, for acting appropriately and being seen to be so by members of the armed forces, not some other body that can carry out its own investigations.

**Anna Soubry:** Exactly. I completely concur with that. I am nodding furiously, but I want it recorded that I absolutely agree. I think you have to then say, if you were to have an inquiry, you would want it to have some teeth, to be able to make recommendations that would be in some way binding, otherwise what is the point of the inquiry? That is when you begin to really eat into the chain of command.

**Q188 Chair:** So it is a problem of binding recommendations, despite the fact that the legislation currently says that the recommendations aren't binding? Presumably it would be possible to say that the ombudsman can carry out an investigation of a thematic issue and make recommendations that aren't binding in the same way that you have in the existing Bill?

**Mr Barlow:** I do think that if you envisage an ombudsman with a role in conducting thematic inquiries, it is a fundamentally different approach. It is not just a small matter to bolt that on to the side of our existing service complaints system; it is something completely different. What scope would it have? How far might they go in looking at whether the Department's operations work or not? What sort of impact would that role have on the confidence of commanders at all levels to make decisions about how best to act? It is clearly possible for other countries to adopt such systems, but our position is that that has a cost. It has an economic cost in terms of the burden of administrative effort involved in setting up those systems. It also has an operational cost in terms of the ability of the armed forces to act efficiently and effectively. That is why it has not been pursued.

**John Woodcock:** I think the Minister wanted to say something.

**Anna Soubry:** I just wanted to say that I think they are two separate beasts, if I can put it like that. This is about service complaints, which you will be more than familiar with—the problems in the past and so on. This is a way that we make sure, when someone raises a complaint, because of the unique character of their employment and so on, that we have a system that is able to ensure that things are done justly in relation to complaints.

The other matters—indeed, the example given by Mrs Moon—are something completely different. I think the Committee’s recommendation was about a different beast, and it is not what this Bill is about. If Parliament—Government—wants to do that, it needs a different mechanism and it needs to go through all that process. I would certainly say that I hope it never does.

**Q189 John Woodcock:** The impact assessment of the Bill suggests that the effectiveness of the new process ought to be reviewed within between three and five years of Royal Assent. What is your view on how that review should be carried out?

Well, if that stumps you—

**Anna Soubry:** No, I am listening.

**John Woodcock:** What about the suggestion that it ought to be the ombudsman him or herself who carries out that review and report towards the end of his or her term?

**Mr Barlow:** It is clear that the ombudsman would do that anyway, as indeed the current Commissioner has done. The process that we have gone through in preparing the Bill has been very much a joint one with the Commissioner. So it is entirely possible that that would happen again.

At this distance, the undertaking that we have set out so far is, if you like, an entirely logical one and no more than that. After the complaints system has been in operation for several years, we will be approaching another armed forces Bill. That will present an opportunity to revise it in the normal way. That will be a Bill introduced in 2020. So you would expect, at the latest, a review of the operation of the system to take place in 2019, which would be after about four years of operation of the system. Clearly, if it is working very badly, in the view of the ombudsman, then you would want to do that earlier.

**Commodore Spence:** In addition to that, it was mentioned—I think under breath—that the annual reports are the prime mechanism by which that has been happening in Dr Atkins’s tenure in post. If I thought about it for five minutes, I could give you a list of things that the services have adopted after recommendations that have been taken and implemented on the express recommendation of the SCC. I just don’t envisage that that would change under a new system. It happens before the four or five-year point; that is my point.

**Q190 John Woodcock:** Finally from me, why are you not allowing the family members of deceased servicemen and women to take a complaint on behalf of their loved ones, given how much endurance they will have gone through during the time and the suffering they may now be in?

**Anna Soubry:** The way I would put it is this: if someone has raised a complaint during their service, and if that person then dies, and there is a link, on the face of it, between their death—in other words, it is usually a suicide—and the complaint that they have raised, that would be an unexpected death, and it would go into the coronial system, so you will have a coroner’s inquest. That inquest is a rigorous look at the events leading up to the death of the individual. The coroner has not only the ability to make findings, but often recommendations linked to them. Those findings are not just, “This person died because they strangled

themselves,” or whatever it may be. They can also look at the events leading up to it and they can make findings in relation to that. So that is the very robust system that exists to make sure something like that does not happen again, if there is a link between the allegations made and their death.

Perhaps we are making a mistake: this is a complaints system. In other words, it is about an individual who says, “This stuff has happened to me.” It is not about terms and conditions. That will not be in the example that we are considering in relation to the deceased’s family. It will be, “I was bullied,” and the allegation will be, “I was bullied by A,” and possibly B and C, or “I was harassed” in some way. So the allegation is made specifically against an individual.

As you will know in your own life, when you make a complaint in relation to the way that somebody is treating you at work, that is a complaint against an individual or a group of individuals. You make your complaint so that you can get redress. In other words, a finding is made that that person has bullied you or harassed you, or a finding is made that they haven’t. So the redress is: what do we now do about that? Do we compensate you for what you have suffered? When somebody has died, an allegation is left. If the family were able to pursue it in the way that is being suggested, there is a grave danger of a huge injustice being done to the person against whom they make the allegation. If they say, “That’s not true; I didn’t do that,” they are not going to be able to test that evidence because, unfortunately, the person who made the allegation is dead.

In the coroner’s court, it is not as black and white as that. Nobody is on trial. Allegations are not being made against somebody. The coroner goes through the process to be able to come to conclusions and findings. In short, it is different. There will be a huge danger of injustice when you have a deceased whose allegations cannot be challenged at all by the person against whom they are made. I hope that makes sense. On the face of it, it seems like a really good idea, but when you dig deeper into it, there is a grave danger of injustice. I don’t know whether the brigadier wants to add to that.

**Brigadier Donnelly:** Only that we would conduct a service inquiry into the serviceman or woman. We would take evidence on oath. It is not an adversarial process. It is about getting to all the issues to identify the lessons to be learnt. That would be before or after the coronial process. That is how we would deal with an issue. Family members are able to apply and able to attend a service inquiry.

**Commodore Spence:** There is some discretion as well as to the type of circumstances it is. I can think of one example where someone who has a complaint to do with an allowance, a pension or pay, dies, and the family may be dependent financially on such things. I think that probably we would take a very different view of that.

**Q191 John Woodcock:** So you are leaving it open.

**Commodore Spence:** Well, because of the individual nature of the complaints, it is difficult to prescribe a set of rules that will fall in with the myriad tiny little cases that we get sometimes within a broad framework of, say, allowances.

**Q192 John Woodcock:** Understood. Such an issue might not have formally been brought to the ombudsman during the serviceman or woman's life.

**Anna Soubry:** Allowances and terms and conditions?

**Q193 John Woodcock:** Yes. It might have been a big issue within the family's life, but not been formally presented, so you would keep an open mind about that.

**Group Captain Heffron:** It may get to the stage of affecting other people in the services also, so it would be in our interest to continue it.

**Anna Soubry:** But there are different mechanisms for doing that. The family would basically make a complaint to the service to say, "Look, he has not had this and he has not had that, and therefore we are suffering as a result." But that is different.

**Q194 John Woodcock:** But that is something different. You said the ombudsman could step in, and you are saying that it would be a different route.

**Commodore Spence:** Not the ombudsman. We would.

**John Woodcock:** Right.

**Anna Soubry:** So you have not raised a complaint in your life, but the family raises the complaint directly with the services. I know from my own work that that does happen, and it is taken very seriously and properly investigated all the way through the system.

**Chair:** Thank you very much for your time. We are now reaching the 3 o'clock mark, and Dr Susan Atkins will be testifying. Thank you, Minister and all our witnesses. We will pause for five minutes while Dr Atkins takes the witness stand.

### **Examination of Witness**

**Witness: Dr Susan Atkins CB,** Service Complaints Commissioner for the Armed Forces, gave evidence.

**Q195 Chair:** Welcome, Dr Susan Atkins, and thank you very much for attending. We will finish this evidence session at 4 o'clock, so we have an hour to move through our procedures. I am going to begin, and essentially I want to get back to the bigger issue. Dr Atkins, you were there during all the earlier evidence.

**Dr Atkins:** Yes, I was.

**Chair:** You will have picked up from the nature and tenor of our conversations that we are worried that the power of your successor, the new ombudsman, will not be as extensive as that of other European equivalents and that the chain of command in Britain has created a strange, amorphous type of ombudsman that has its wings clipped, compared with the powers of other ombudsman in the United Kingdom and particularly of armed forces ombudsmen in Europe. Can you try to explain to us why that should be the case, and what your response is to the Committee pushing for more extensive powers?

**Dr Atkins:** Yes. Thank you for that. You'll understand that I have given this a lot of thought. I think there are two different aspects. The first is the comparison with other ombudsmen and oversight institutions in Europe and the second is with our own different types of ombudsmen. They are different.

Across Europe, there are many different types of oversight bodies for armed forces. Mrs Moon referred to the Geneva Centre for the Democratic Control of Armed Forces. I have been a very active member of that and the international organisation of ombudsmen for armed forces across the world. They differ because of the constitutional position of the armed forces and the constitutional arrangements.

Broadly, there are those countries where defence is part of the state ombudsman arrangement, as it were, bringing defence within the parliamentary and health ombudsman. There are those who are inspectors-general, so that in countries such as the Netherlands, Belgium and France, the role is independent but within the armed forces themselves. That is an arrangement. Australia, interestingly, has a hybrid of both of those—a different part of the world.

Then there are defence ombudsmen. For the most part they are parliamentary ombudsmen of parliamentary armed forces. They have a duty, not simply to deal with complaints, but with welfare and occasionally with families and civilians as well. That explains in part the difference between the arrangements for this ombudsman and the parliamentary defence ombudsmen that have that broader duty of care and welfare to report to Parliament, through Committees such as yours. That is one aspect. I did say to the Geneva Centre that we were unusual and they said we were unique, but they were commenting on the current role.

In relation to other ombudsmen, it seems to me that, as was discussed a little while ago, there is usually not a nexus between the people complaining and the organisation about which they complain. This would be an unusual—I think unique—ombudsman in that it is an employment relationship. It is there because service personnel uniquely don't have the same protections that every other employee has in relation to going through employment tribunals, contract of employment and everything else.

I talked about the third element in my written evidence to the Committee. I have seen from the outset service complaints being part of operational effectiveness. The reason that I have not been able to say that the system is working efficiently, fairly and effectively is largely down to delay, but that delay is because individual commanders and up the chain of command are not grasping and gripping personal responsibility, but are tending to shirk that responsibility and put it on someone else, be it lawyers or elsewhere.

Given that, as we discussed the form and role of the ombudsman, the Defence Council said that it was prepared to be governed by the investigations of the ombudsman into its own handling, and given that the ombudsman's reports would be saying, "This commanding officer or this appeal body within the chain of command dealt with this well or poorly," it was a means to galvanise the whole system from the Defence Council downwards to deal with their people properly. That seemed culturally the way to go.

Of course, you are right that sometimes in this country ombudsmen—the prisons and probation service ombudsman, for example—have started looking at maladministration and gone to the substance. But I think that, although it appears to be like that, there are different factors in play. That is why I think this system will be effective. If it is not effective—and there was a question at the end of the previous session about how we judge whether it is effective—then as I said in my written evidence to you, it may be time to make a change.

A caveat to all of that is that there is a category of complaints about the provision of services, not about the employment relationship—I have talked about this with the Committee before—which is those against the military police. Complaints about the military police, in the execution of police duties, are in a different category. I am on record as saying that I think those should be independently investigated and that they should be brought under the same oversight bodies as the civilian police services.

**Q196 Sir Bob Russell:** Can I ask you to clarify? Are you talking about the Royal Military Police exclusively, or are you including the Ministry of Defence Police as well?

**Dr Atkins:** The Ministry of Defence police are within the Independent Police Complaints Commission; I am talking about the Royal Military Police, the RAF Police and the naval service police.

**Q197 Chair:** Among the recommendations we are tempted to make are that the ombudsman is appointed independently, without involvement from the Secretary of State, that there is a clear fixed-term five-year limit and that, if that were renewed, possibly that would be for no more than three further years. What are your views on that? Why shouldn't we push for those measures to be in the legislation?

**Dr Atkins:** As you heard, the intention is that it should be advertised for five years. I think there are legislative precedents. I have worked in non-governmental bodies—they used to be called quangos—where the appointment of the chair was in primary legislation.

My staff and I have been working with officials and senior service officers. There is the question of the independence of the ombudsman and that of the perception of their independence. And some things are in regulations that I think should be on the face of the Bill and some things on the face of the Bill would be better left in regulations. It is the role of this Committee and parliamentary scrutiny to get that right.

**Q198 Chair:** Just to clarify, you cannot see, in principle, any philosophical constitutional objection to beefing up the independence of the ombudsman in terms of the Secretary of State's role in their appointment, nor any great objection to the Bill stipulating a five-year term with limits on its renewability, nor stipulating the minimum time between leaving the armed forces and becoming an ombudsman that should elapse before an individual should be considered for that role.

**Dr Atkins:** Putting aside your last sub-clause, in relation to the term it is probably not strictly necessary. As you heard, it is a public appointment that is governed by the rules of public appointment, as is mine. But it would help the perception of independence if that was in the Bill. It is sensible to have at least the ability to renew. As you know, I am staying on

because my successor was not appointed in time—events happen. But, in principle, I do not see a problem with that.

**Q199 Mrs Moon:** In your written evidence you said, “It is right that the chain of command retains responsibility for handling service complaints,” and that, “The proposed solution is also workable because it has the support of the service chiefs.”

**Dr Atkins:** Yes.

**Q200 Mrs Moon:** Throughout the evidence session, we were constantly told about the importance of retaining the integrity of the chain of command. Is the new system simply a compromise to maintain the chain of command rather than an opportunity for free and open investigations and inquiries into the operation of complaints?

**Dr Atkins:** I don’t think that it is a compromise. I think you heard the Minister say that it is a balance. I think that the balance is somewhere else. It seems to me that what it is doing is really holding that chain of command to account.

If the ombudsman can review how the Army Board has dealt with its own people and say, “You did not deal with this properly,” and that finding is to be binding, or the recommendations are to be strongly influential, that, through the annual reports, will put in the public domain that the chain of command, at the highest levels, has been reviewed and found wanting as well as the actions taken to correct that deficit. I don’t think you should see it as a compromise or a sop to the chain of command; it really is increasing accountability and transparency.

**Q201 Mrs Moon:** We heard that there are different processes within the different services for handling service complaints. How will the new model take those into account? Do you see any problems with that, and would you have preferred a uniform complaints system?

**Dr Atkins:** I was a bit bemused by that discussion, because it’s not my experience that there is a different process. There’s certainly a different way of going about the process. You heard the difference between the services in relation to oral hearings, where the Army Board will take a more legalistic approach to whether there should be oral hearings. The RAF may take a more humanistic approach. I’ve recently been in discussion with service chiefs in the RAF where it wasn’t necessary to have an oral hearing for the evidence but it would actually have been the right thing to do, and they’re changing their rules about that. It’s not a different process; it’s the same process but a different approach. The Navy tends to focus on resolving people’s problems, and you heard from the Commodore himself. If the Navy finds there is a quick fix to someone’s problem, they will offer it and see what they can do because they have to get people back into the ship, back to work and out at sea.

I think the ombudsman offers a real benefit by being able to look at the handling of complaints in depth, particularly those at a higher level, and make recommendations and say, “This should be something adopted by all.” It may be, “Army, you have to be less legalistic and trust your commanding officers. You trust them with hundreds of men and women on the front line, so trust them to deal with their people when they have problems.”

**Q202 Mrs Moon:** Is that something you would like to say now?

*Dr Atkins:* I do say it, regularly.

**Q203 Mrs Moon:** You've expressed concern in the past regarding the inability of the MOD and the services to provide accurate and timely information on the number of complaints. Do you think the proposed new model will deal with those concerns?

*Dr Atkins:* What was accepted—the response to my 2013 annual report was published a few weeks ago—is that there will be another audit by the defence internal audit to find out whether their systems for recording are being done accurately. That is exactly the sort of information the ombudsman would have before him or her to be able to test that.

**Q204 Mrs Moon:** Would it be helpful if you had details of the number of complaints withdrawn, the nature of those complaints and the reasons for withdrawal?

*Dr Atkins:* Yes, it would. That was one of the recommendations I made. At present, the information given to me is withdrawal and informal resolution together but I recommended that those should be separated. A few years ago, I said that people should not be asked to withdraw complaints that are informally resolved; they should simply say, "Those have now been resolved." That has now been done.

**Q205 Mrs Moon:** Should there be a single form used by the three services?

*Dr Atkins:* Yes.

**Q206 Mrs Moon:** Should those forms go to both the chain of command and the ombudsman, so that the ombudsman is aware of the numbers coming through at all times?

*Dr Atkins:* I'm not sure that the ombudsman needs to see the actual forms. What is being retained in the Bill, as you know, is the ability for anyone—whether the individual or someone on their behalf—to put a complaint through the ombudsman and pass it to the chain of command. I now get details of all complaints, whether made through me or not, that have been in the system for over 24 weeks. That's very useful information and that will continue. I think I refer to that in my written evidence. One of my concerns is that if a case is delayed and the ombudsman only comes to review it at the end and says there has been maladministration and injustice because of delay, it's too late. I want the ombudsman to be able to raise a flag and say, "Right, now you are on marked time. Be aware that if this is not resolved properly and reasonably within a short time there will be a finding against you."

**Q207 Mrs Moon:** Do you feel that those powers are in the Bill as it stands?

*Dr Atkins:* Yes, I do.

**Q208 Mrs Moon:** The Bill's intention is that the service complaints ombudsman is limited to investigating complaints of alleged maladministration and not the substance of the initial complaint. Other ombudsmen have the power to investigate service failure. Is there something you feel that, in addition to maladministration, the ombudsman should have the power to investigate?

*Dr Atkins:* It is maladministration and injustice. You heard from the previous witnesses, including the Minister, that that is not to be defined. It is about whether the

complaint has been dealt with properly and whether there has been injustice. In general, the judicial review test will be used, which will go a long way. It goes back to the balancing act that I talked to the Chairman about at the beginning. Where do you put the power of the ombudsman to bring about change and justice for all those who are involved in a complaint in an operational setting?

**Q209 Mrs Moon:** So you don't think the ombudsman should have the power to investigate the substance of individual complaints?

**Dr Atkins:** No. It is maladministration and injustice, so a lot of the issues will be caught. That is what that evidence shows, and that is the feeling of the other ombudsmen to whom I have spoken. If, in a couple of years' time, it looks as though the ombudsman is saying, "This isn't sufficient," or the changes I talked about with Sir Bob in relation to service providers and the police have not occurred, then ombudsman should have the discretion to do an investigation into complaints about, say, police powers. There is a difference between the provision of services and workplace complaints.

**Q210 Mrs Moon:** If you had a blank piece of paper, which of the other systems for ombudsmen that operate around the world would you implement here?

**Dr Atkins:** Right here, right now, I think this is good. I followed the debate about the thematic reports, and it would be helpful to clarify that. We got to the answer in relation to Mr Twigg's question. On your hypothetical example, it seems to me that if the ombudsman became aware that people are deliberately not being allowed to make complaints about wrongs that have been done to them because they are being ruled out of time without the individual circumstances being looked at, or there is delay, or people are not being told about their rights, that is an abuse of the system that goes to the efficiency, effectiveness and fairness of the service complaints system. It seems to me, from the interpretation of that provision in the Bill that was confirmed to you, that the ombudsman would be able to do an inquiry and a report into that. That would be a thematic review.

When I was last at the Committee, I was asked what should be the subject of a thematic review. I said, "The handling of complaints about serious bullying." I had to make a recommendation to the Army to do a review of serious bullying, which it did. I want the ombudsman, under the Bill, to be able to say, "I am not satisfied, from the evidence I have seen, that the handling of complaints about serious bullying is being dealt with properly," and do a thematic report on that. If there is any question about whether the Bill covers that, it should be clarified.

**Q211 Mrs Moon:** In relation to the case I highlighted, the problem is that people cannot make a complaint because they are not aware of the injustice, so they need someone from outside to make a complaint. Do you think that power should exist?

**Dr Atkins:** Well, the ombudsman would be able, if they were made aware, to make inquiries. There are organisations—you have taken evidence from some of the people who are involved in them—that can tell people that they can make a complaint. Of course, under the Bill, if people make a complaint and it is ruled out of time, they can appeal to the ombudsman, whose decision about whether it was correctly ruled out of time is binding. That is a really important power. It covers the loophole that I have discussed with the Committee

before: for those who have left the services and have a complaint made out of time, there is nothing they can do about it. Now they can; they can go to the ombudsman.

**Q212 Mrs Moon:** New section 340H(2) provides that an application to the ombudsman must be made in writing and must contain the information specified in regulations made by the Secretary of State. Is there a danger that the requirement for a complaint to the ombudsman will be overly prescriptive and dissuade complaints if it has to comply with regulation?

**Dr Atkins:** I think that is one of those matters that I referred to—it is in the Bill but I think it could be in the regulations. I don't think it is helpful or in accordance with modern practice. I would very much like my successor to have an ability where people—as they can with other ombudsmen—can telephone, and the ombudsman staff can take a complaint down, look at the information they have got and say, “This is not a matter for us. We'll redirect you to the people who can help,” or assign somebody to investigate, take further details and move it through. Ironically, the requirement that the complaint to the ombudsman is in writing is in the Bill, but there is no requirement that a service complaint needs to be made in writing. It is just one of those things where, probably, the draftsmen have looked at what was standard ombudsman legislation and put it in, but it would be helpful if it wasn't there.

**Q213 Mrs Moon:** The concern of the Committee is that perhaps some of the people who may well feel that they have a complaint are not, perhaps, the most articulate to put something down in writing and that, therefore, a conversation would be more appropriate.

**Dr Atkins:** Yes, and at the beginning of the system somebody can get somebody else, as they very often do, to come to the ombudsman about a concern. That does not have to be in writing. People write to us on somebody else's behalf and we take it from there. I am concerned that an individual may have gone through the process—they might be very articulate—and could fear that, having been turned down twice, they will be penalised or action will be taken against them if they do go to the ombudsman. It would be helpful for other people to be able to alert the ombudsman and take the matter forward.

**Q214 Sir Bob Russell:** Dr Atkins, do you have any concerns regarding the Ministry of Defence and each of the services providing the documents and information that the ombudsman requires for an investigation?

**Dr Atkins:** No, I think the Bill provides that the ombudsman should have the powers of the High Court to compel the production of documents. I know that has caused concern elsewhere but the service chiefs have confirmed—through the vice-chief to the Lords' meeting that I was at a few weeks ago—that they are content with that and it is to remain in the Bill.

**Q215 Sir Bob Russell:** You don't think it needs to be explicitly spelt out in the Bill?

**Dr Atkins:** It is in the Bill.

**Q216 Sir Bob Russell:** But you have no concerns that they will comply with the Act?

**Dr Atkins:** If they get the ombudsman right, no.

**Q217 Sir Bob Russell:** I wonder if I could put to you the question that I put to the Minister and the service people: why is it appropriate that the Bill provides for the Secretary of State to make regulations about procedure to be followed by the ombudsman in carrying out the investigations? Will that not undermine the independence of an ombudsman and reduce confidence in the service complaints system?

**Dr Atkins:** Well, it is right that the Secretary of State bears ultimate responsibility for the service complaints system but, as with other ombudsmen, it should be for the ombudsman to decide what the procedure should be. I am very much of the view that complaints systems generally should be built on principles and you should not have reams and reams of detailed procedure, but it seems to me that there are matters in the draft regulations—we have not yet been consulted on the draft regulations; they have been published because the House of Lords wanted to see them and it was made quite clear when they were given that they were subject to consultation—that, although it is not the policy intent, would undermine the perception of the independence of the ombudsman, even if in reality they didn't.

**Sir Bob Russell:** Thank you for your clear response.

**Q218 Derek Twigg:** Can I ask a few questions about the independence of the ombudsman system as a whole? In your memorandum you say, "Where there has been maladministration and actual or potential injustice, the Ombudsman's finding will be binding." Should this be set out more clearly in the Bill?

**Dr Atkins:** It might be helpful to have it in the Bill. Again, it goes to that issue of giving confidence to people if it is in primary legislation.

**Q219 Derek Twigg:** So are you relaxed about it?

**Dr Atkins:** It is not for me to decide.

**Q220 Derek Twigg:** I am just asking for your opinion.

**Dr Atkins:** My answer would be, why not? You have heard that it is the intention that the findings be binding. So, why not?

**Q221 Derek Twigg:** So the recommendations should be binding?

**Dr Atkins:** No, I think the recommendations, in line with public sector ombudsmen, should be highly persuasive, because—

**Q222 Derek Twigg:** So the same basis as the local authority or health ombudsman?

**Dr Atkins:** Yes, exactly. There is a safety net there. There is a guarantor. The Bill provides that the Defence Council should give a response to the ombudsman's findings and recommendations. If they depart they have to give reasons. The ombudsman will then put those in the annual report. The case will be anonymised to protect individuals' confidentiality, but if the system is truly to hold people to account then that is how it should work. But there may be something that the ombudsman recommends and the Defence Council wants to do something that is stronger or there are good reasons why it is not feasible

but actually it is as good as. Again, it goes back to giving the sense of ownership, which is so essential.

**Q223 Derek Twigg:** New section 340L(7)(c) enables the Secretary of State to make regulations about obligations, including those of confidentiality, and that may be imposed on those who receive the ombudsman's report. Do you agree that there should be this confidentiality? I am thinking in terms of how that works with the health ombudsman and the local government ombudsman, for instance.

**Dr Atkins:** Again, we have not had a discussion on the regulations. I am not sure that it is necessary. The current legislation that I work under enables the Secretary of State to amend any report that I make on grounds of national security or protection of the safety of individuals. That seems to me, from the evidence that you heard, to cover the harm. So that is an issue that I will want to have discussions about.

**Q224 Derek Twigg:** But you think there is some danger in having that in there, or concern?

**Dr Atkins:** I don't think it is the current policy intention, but if there is ability to make regulations, which will come through the Houses of Parliament, it opens the door to the Secretary of State being able to undermine the reports and the power of the ombudsman to speak out freely. There is a risk.

**Q225 Derek Twigg:** Going back to my question to the Minister—you touched on this before, in response to the case given by Madeleine Moon—do you think the Minister's answer was clear in that the ombudsman should be able to produce a thematic report on their own initiative? Do you think that is clear now or is it still unclear? I thought it was unclear myself, but I don't want to lead you in any way.

**Dr Atkins:** I think we got there in the end, but there was quite a debate. It would be helpful for it to be clarified.

**Q226 Derek Twigg:** So we are perhaps part of the way down the road but not quite 100%?

**Dr Atkins:** My understanding of the current provision is that, although it does not say it because that is the basis on which we have the current yellow and red flag reports on delay, if I am concerned about delay in any case, or if cases are badly delayed, I can make a report on my own volition to the Secretary of State. It is on the basis of exactly the same-worded provision in the current legislation, and both my lawyers and the MOD lawyers agree that that gives me the power to do so. I am assuming, therefore, that it moves on to the ombudsman having the powers to do so, but given that it is an interpretation, it may be helpful to clarify that.

**Q227 Derek Twigg:** Do you think that there can be a report without an investigation, or an investigation without a report?

**Dr Atkins:** It would have to be a report—there could be, under the other powers, a report about the investigation into a particular complaint. What we are talking about here is, if there are patterns of complaints that are poorly handled or types of complaint that are not being handled properly where there is injustice, for the ombudsman to be able to say, "I am

not satisfied that complaints about serious bullying are being dealt with properly,” and to look at that, get information and create a report on the ombudsman’s own volition.

**Q228 Sir Bob Russell:** Dr Atkins, what is your assessment of whether complaints of harassment, bullying, discrimination and so on should go directly to an employment tribunal?

**Dr Atkins:** Complaints about unlawful discrimination, which is a narrower type, as you know, can go, but service personnel uniquely have to make a service complaint first. It seems to me that this is an issue that probably could be looked at under the Armed Forces Covenant, because they are in a different position.

**Q229 Sir Bob Russell:** That is an interesting observation. The Bill envisages that complaints will usually follow a two-stage process—complaint and, if required, appeal—rather than the three levels as at present. However, does the introduction of the option to appeal to the ombudsman simply replace the level that has been removed, and does the change actually simplify the complaints system?

**Dr Atkins:** I think it goes further than that, and that is where the development of my proposal has occurred. Although most complaints will go to the commanding officer and up that chain currently, there are some complaints—about medical treatment, about pay and allowances, about housing—that may start as a service complaint, go off into a special-to-type complaint process and then come back. The big step forward is that a complaint will be received and it will be decided whether it is a service complaint, but if it is about, say, medical treatment, it will go into the medical complaints system and there will be a decision by somebody empowered to resolve that complaint, one appeal and then to the ombudsman. So it is cutting out a huge amount of time and process.

It also means that instead of having a complaint to a commanding officer who actually has no ability to resolve that complaint, it will go directly to the person who can do something about it if they find that the complaint is well founded. It is a two-stage process, but it is, get the complaint to the person who can fix it, and get it to an appeal. The appeal could be a sort of floating appeal, depending on where the level needs to be, and with an independent person. You can have an independent person sitting with somebody currently who is much lower down than the Defence Council. I think it should be a much more efficient and effective system, and then what you have got is the ombudsman holding the people who have made decisions on that complaint to account.

**Q230 Sir Bob Russell:** Do you envisage a serving member of Her Majesty’s armed forces who has, or is about to, set off on a complaint and is still serving in the forces seeking to involve his or her Member of Parliament as part of that complaints process?

**Dr Atkins:** I do not see that they would need to, but I am not sure that they could not. Quite often, I get letters from Members of Parliament about members of the services who have got a complaint in the system about whom there are concerns, and I reply to them now.

**Q231 Sir Bob Russell:** So we would not be ruled out?

**Dr Atkins:** I do not know whether there are any rules about individuals writing to their MP, but I do not think that there are.

**Q232 Sir Bob Russell:** I am not looking for work, but I represent a garrison town. Do you have confidence in the Defence Council's ability to appoint people to hear an appeal under the internal system with "the necessary authority to grant appropriate redress"?

**Dr Atkins:** I do not see why they shouldn't. They appoint people with necessary authority to resolve all sorts of things. If there is a problem, the ombudsman can say so and make recommendations to make sure that they do it right next time.

**Q233 Sir Bob Russell:** My last question is, what is your assessment of the time limits for different parts of the service complaints system in the Bill?

**Dr Atkins:** For the most part, they follow the current minimums, so giving three months to make a service complaint, six weeks to make an appeal, six weeks to go to the ombudsman. Again, there is a trade-off between timeliness—delay is unfair to the person making the complaint and to the person the complaint is made against—and detail. If you are going to have tight timetables, then you don't need lots of grounds to be able to make it, if you see what I mean. I think they are fine. I have said to the services that it is reasonable to resolve complaints within six months, 24 weeks.

**Q234 Mrs Moon:** I have two quick questions. You said you had some concerns in relation to the regulations. Would you be willing to share any concerns that you have with the Committee?

**Dr Atkins:** I am afraid I am not in a position to do so. Regulations were published when I was on sick leave with shingles last week. Although I have looked online, I can't say that my looking was very intelligent, given that I was coping with pain and exhaustion at the time. If you want me to, at a later date when I have had a look at those, I am very happy to write any observations.

**Q235 Mrs Moon:** I think we would find that most helpful. Your comments are always most helpful.

There was one area that we raised with the Minister that we would also welcome your comments on. It is in relation to a request for information and that information not being forthcoming. Do you have any concerns about the suggestion that the ombudsman should proceed even where information hasn't been forthcoming? Is that a permissive for people to withhold information that might influence how we investigate the ombudsman's decision?

**Dr Atkins:** I do not read the regulations as being intended to do that. Again, just taking the hypothetical example that the ombudsman said, "I want that information," and the person in the services said, "We are not going to give that to you because you can do the investigation without it," the ombudsman would say, "It's for me to decide whether I can do it, not for you. If I say I want that and you withhold it, I shall go to the High Court and let them decide." I don't sense that there is a problem, but if there were to be a problem, there are powers there for the ombudsman to overcome it.

**Q236 Mrs Moon:** Certainly, our concerns were less that they would refuse to give it, and more that, let's say, à la the Home Office, things go missing.

**Dr Atkins:** Records do go missing. They go missing now. I am meeting the Surgeon General after this, but I regularly receive complaints that records are missing. I now take that up and sometimes they are found. If you are moving hundreds of thousands of people around the world and you have been using paper records, things do go missing, but I don't see that it is deliberate.

**Q237 Chair:** Dr Atkins, I am going to trespass a little bit on your time and colleagues' time over the last 15 minutes to go back through some of the areas that we have covered. We are hoping, as a Committee, to present amendments to legislation and we wanted to make you feel that you had had a fair opportunity to see the direction in which we are going and see if you had any objections or anxieties. Apologies if some of this is going over ground you have already covered.

My understanding is that you do not have any in-principle objection to the notion that a time limit on term could be included in the legislation, but you had some pragmatic comments about how, occasionally, as in your case, it may be necessary to extend the time of an individual.

**Dr Atkins:** Yes.

**Q238 Chair:** Am I correct in saying that you do not have any in-principle objection to putting a minimum time that needs to elapse between departure from the armed forces and entry into the role of ombudsman? We have suggested a five-year time.

**Dr Atkins:** No; I parked that issue and did not address it. I think that is for Parliament and the Secretary of State to decide. It seems to me that there are real benefits to have somebody who is independent of the armed forces. With regard to armed forces and civil service, I was a civil servant before I became an ombudsman. There was not a time limit between that and I hope people have not thought that I have been less than independent.

My principal approach would be that the focus should be on getting the right person and looking at their bundle of competences when they apply. Rather than putting a restriction on who can apply, it is about trusting your appointment process, with all the checks and balances, the independent elements that we have heard about, to get the right person. From experience here and across the world, I still have the view that having somebody who has not been a member of the armed forces is really helpful to the armed forces, because they come with a different viewpoint. Whatever our profession, we have blindspots. I think it is helpful to have somebody who will have a different blindspot from yours.

**Q239 Chair:** Just to summarise, you are essentially saying that you would tend to the view that they shouldn't be someone from the armed forces, but you wish to leave some flexibility in the hands of the appointment committee.

**Dr Atkins:** Absolutely.

**Q240 Chair:** Moving on, then, to someone who has died. Should the family be able to pursue a complaint?

**Dr Atkins:** I am very interested to follow the discussion here and in the other House in relation to the discretion that is open. You heard today from Commodore Spence that in

principle if there is a complaint in the system and the person bringing it has died there is a discretion to continue with that complaint. In answers to other questions Ministers have said that if the family has a concern about something that happened to a service person before they died it would be looked at, not within the service complaints system, but looked at.

It seems to me that particularly when someone has died, the services and Ministers would want the families to have no lingering suspicions. It may be helpful in those circumstances for the Secretary of State to ask the ombudsman to review it. Certainly, if the discretion is exercised to keep a service complaint going after someone has died, I don't see why there should be any problem to the ombudsman reviewing whether that has been dealt with properly for the family. That will then give them that independent assurance.

**Mrs Moon:** Indeed.

**Q241 Chair:** To be really pedantic about this, do you have any objection to inserting, where the person by whom a complaint might have been made under subsection (1) or (2) of new section 340A has died or is for any reason unable to act for himself, that the complaint may be made by his personal representative, or by a member of his family, or another individual suitable to represent him? That is based on a similar provision in the Parliamentary Commissioner Act 1967. Amendments have essentially been tabled in the Lords by Lords Rosser, Tunnicliffe, Thomas of Gresford, Palmer of Childs Hill, Baroness Garden and Baroness Suttie.

**Dr Atkins:** Like the Minister, I am a lawyer and I would want to look at that in the context of the Bill before I gave a yes or no. It sounds fine but I think I would like to have it as a discretion. May I come back to you when I have seen the written form?

**Q242 Chair:** Okay. Moving swiftly onwards, as I am very conscious of time, in the last remaining 10 minutes. At the moment there is some ambiguity in the legislation on whether the Defence Council is obliged to consult the Service Complaints Commissioner or ombudsman on creating procedures for making a complaint. Would you agree with us that there should be a statutory obligation for them to consult the ombudsman?

**Dr Atkins:** About making a service complaint?

**Chair:** Correct.

**Dr Atkins:** I think that is a very sensible thing.

**Q243 Chair:** Brilliant, excellent. Now, the real nub of the issue, which we keep edging around and which we keep getting some ambiguity about. We are of course pushing that in addition to being able to investigate simply maladministration, the ombudsman should also be able to investigate a service complaint, so the subsection we are proposing is that the service complaints ombudsman may investigate a) a service complaint, and b) an allegation of maladministration in connection with the handling of a service complaint. We believe that that would bring the ombudsman more in line with European practice. My sense was that you disagreed with that insertion for some reason.

**Dr Atkins:** I have come to the view that what we have got currently is right for now.

**Q244 Chair:** Just explain to me again, for a bear of very small brain, why is it you do not want this included?

**Dr Atkins:** Because I think it is wrong to say it brings it in line with European practice, because European practice varies. Where the European ombudsman for the most part can investigate complaints and the substance, it is because they have a welfare duty. So I do not think that that holds up.

**Q245 Chair:** Sorry, can you clarify that a little more? Why is it important that the people who tend to investigate substance have a welfare duty?

**Dr Atkins:** Because the ombudsmen have a duty to report to Parliament on the welfare of the service personnel. So, if they are only looking at the handling of the complaint, they are not able to say, "I'm looking into bullying." They are saying, "I'm looking into the handling of bullying." This ombudsman is not being set up to be the person who gives reassurance to Parliament on the welfare. You may feel that they should do, but that is not how it is set up.

**Q246 Chair:** So, Dr Atkins, just to clarify, I am an individual who feels that I have been bullied or harassed in the system. Presumably, from my point of view as the victim, I would like the ombudsman to be able to consider whether I have been bullied or harassed, rather than simply whether the service correctly handled the procedure for my harassment complaint.

**Dr Atkins:** Well, you might do, but remember, as with all ombudsmen, and ombudsmen in other countries as well, the ombudsman comes in at the end of the internal process, even when they are looking at the substance of the complaint. If you are being bullied and harassed, you want that bullying and harassment to stop. The ombudsman cannot do that. If you are out in Germany or Cyprus, or even down in Plymouth, and I am sitting in London, I cannot make the bullying stop. Your commanding officer can make the bullying stop. Somebody in the chain of command can make it stop.

**Q247 Chair:** But ultimately, when I go to the ombudsman, I have gone through the process and I am looking for justice. It would be very unfortunate if I got to the end of the process and you stuck your hand up and said, "I don't have any view on whether you were bullied or harassed; all I am saying is that the service followed the correct procedure." If I had been bullied or harassed, I would find that pretty rich.

**Dr Atkins:** But, as you have heard this afternoon, maladministration and injustice is not about reviewing whether the procedure has been followed. It is about whether you have been dealt with properly. Has the way that your complaint has been handled got to the issue of whether you were bullied? Have you been given protection? There is a whole range of things. That is why the word "injustice" is so important. It is not just maladministration; it is not just ticking the box. It is saying, has your chain of command protected you properly when you have raised the complaint and dealt with it properly? And have you been dealt with fairly?

**Q248 Chair:** So what is the distinction? The way that you have defined injustice seems quite broad: have you been dealt with fairly? What is the difference between injustice and the substance of the complaint?

**Dr Atkins:** Looking into the substance of the complaint would not look at how you have been treated by your chain of command. It would go to how you have been treated by the person whom you told about bullying. In a service context—this is a really helpful discussion—when things go wrong, what service men and women want, and the majority get, but an unfortunate minority don't, is to have confidence in the people with whom they trust their lives to actually resolve it. They want the system to work properly, and that is what the ombudsman will do.

**Q249 Derek Twigg:** Can I just be clear on the Chair's question? At the end of the day, it is not whether, on the balance of probabilities or on the balance of evidence, the bullying or whatever was found in her favour. That is not your concern; it is whether the process that gets to that decision is correct. Is that—

**Dr Atkins:** And whether that is fair.

**Q250 Derek Twigg:** You and I might look at it and think that there was some bullying or that something took place and that some action was needed, but someone else might have a different opinion. The decision is not on the balance of evidence, is it?

**Dr Atkins:** Yes, it might be, but if you said, "Look, I am pretty certain that you were bullied, but this investigation hasn't got there," that investigation, for whatever reason, has not been properly done.

**Q251 Derek Twigg:** So you do make a judgment on whether they were bullied.

**Dr Atkins:** You do make a judgment, yes. And it is on injustice or potential injustice.

**Q252 Chair:** Finally, I will stop—I am in a pedantic mood—but you made a much bigger claim about why you felt that other kinds of ombudsmen were not a good analogy for service ombudsmen. You drew the distinction that other kinds of ombudsmen do not deal with the relationship between an employer and an employee, but that between the public and the Government. Why is that distinction important in determining the powers of this ombudsman?

**Dr Atkins:** Because the ombudsman fills a gap between the citizen and the state. The reason for an ombudsman is that there is a power gap. There is a power gap in relation to rank and freedoms between the service personnel and the chain of command, but the chain of command has duties as well—in relation to protecting their lives, housing them and providing for their health—in a way that other employers do not, which is why you have got an ombudsman. But they do have those duties and responsibilities. If a member of the public thinks that they have not been dealt with properly by the health service or by local government, they have not got that same nexus that an employer-employee has.

**Q253 Chair:** I understand that they do not have the same nexus, but I cannot understand why that is relevant in defining that the ombudsman should have reduced powers.

**Dr Atkins:** Because the employer has those direct responsibilities that a person providing services does not.

**Q254 Chair:** In very concrete terms—help me understand. This ombudsman—your successor—compared with other kinds of ombudsmen will have slightly fewer powers. And you are suggesting that the reason for that is that the services ombudsman will deal with the relationship between an employer and an employee. Why should that difference be relevant in determining the scale of powers? Can you give us a concrete example of a power that exists elsewhere that will not exist here and why the employer-employee relationship makes a difference to that?

**Dr Atkins:** I am trying to think. I was thinking in terms of—no, that is—in relation to. If you think of the distinction of payment: a complaint about pay—

**Chair:** Yes.

**Dr Atkins:** Has that complaint been dealt with properly and has there been an injustice? That needs to be dealt with properly. If it is dealt with properly and it is upheld, that can be ordered and it can be paid; there is a direct relationship. In relation to the provision of, say, social services, who will order the provision of social services? Sorry, you have put me on the spot and I am trying to think—

**Q255 Chair:** Perhaps in addition to the written evidence you very kindly provided to us, could you kindly drop us another note looking exactly at the question of which powers other ombudsmen in the United Kingdom have that this ombudsman does not and your reasons for why this ombudsman should have less significant power?

**Dr Atkins:** I am happy to do that, yes.

**Chair:** Okay. Thank you very much indeed for your patience and full answers.